

Federal Court



Cour fédérale

Date: 20140624

Docket: IMM-11476-12

Citation: 2014 FC 608

Ottawa, Ontario, June 24, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

B381

Applicant

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (Board), dated October 10, 2012, in which it found that the Applicant was not a Convention refugee nor a person in need of protection pursuant to section 96 or 97, respectively, of the *Immigration and Refugee Protection Act, SC 2001, c 27* (IRPA). This application is brought pursuant to section 72 of the IRPA.

Background

[2] The Applicant is a 34 year old male citizen of Sri Lanka who was a passenger on the *M.V. Sun Sea*, one of two ships bearing Tamil asylum-seekers that arrived in Canada in 2009 and 2010. He claimed protection as a Convention refugee based on fear of persecution for reasons of his race, membership in a particular social group and political opinion at the hands of the army, the police, the Liberation Tiger of Tamil Eelam (LTTE) and the pro-government militant groups. He also claimed that he was a person in need of protection because he faced a risk to life, cruel and unusual treatment or punishment, and torture.

[3] The Applicant claimed that in 1996, when returning from a displaced persons refugee camp, he was detained for 40 days by the army. During this time he was questioned about his connections to the LTTE and accused of being a LTTE supporter. He was kicked, his hands were tied behind his back and he was beaten with a plastic pipe filled with sand. When his family paid money, he was brought to court and was released as there was no evidence for charging him.

[4] In 1996, the army took control of Jaffna and tried to implement measures to prevent infiltration by the LTTE. In 2002, the LTTE was permitted to enter some army controlled areas. It recruited, abducted, abused and extorted money from people, including his parents. In 2003, the Applicant traveled to Saudi Arabia to work. After his return to Sri Lanka, he got married in 2007.

[5] From 2007 to 2009 the Applicant worked in Malaysia. In mid-2009 he returned to Sri Lanka as the war had ended and the LTTE reportedly defeated. He claimed that in April 2010, the Eelam People's Democratic Party (EPDP) and army intelligence came to his home and questioned him about his connections to the LTTE. They stated that they had received information that escaped LTTE cadres had come to his home and that he had arranged accommodations for them. He was told that he must identify the people he had helped and those who asked him to help them, failing which he would be detained. They also asked about his visits to Malaysia. They said they would return soon and he must give them reasonable answers.

[6] The Applicant claimed that in May 2010, the EPDP again came to his home stating they had received information that he assisted the LTTE. They informed him that this was serious and that he would be arrested soon unless he paid them 3 million RS. The Applicant indicated that he did not have any money. He was provided two months to pay, failing which he would be arrested.

[7] The Applicant claimed that he did not want to pay the money and arranged for an agent who took him to Thailand on June 1, 2010 where he boarded the *M.V. Sun Sea* on July 5, 2010 and arrived in Canada on August 13, 2010. The Applicant claims that his wife has informed him that, after his departure, the EPDP returned to demand money and the army came and threatened his arrest.

Decision Under Review

[8] The Board found that the Applicant was not a Convention refugee pursuant to section 96 of the IRPA nor or was he a person in need of protection pursuant to section 97. The determinative issues were the credibility of the Applicant's subjective fear of persecution and whether his prospective fear was well-founded.

[9] The Board stated that it considered the changing country conditions, the Applicant's risk profile and whether he would be personally subjected to a risk of life pursuant to sections 96 and 97 of the IRPA. Further, whether he had established that as a failed asylum seeker or passenger aboard the *M.V. Sun Sea* he was a refugee "*sur place*" as described in the United Nations High Commission for Refugees (UNHCR) Handbook.

[10] The Board found that there has been a positive change in Sri Lanka since the end of the war. The 2010 UNHCR Guidelines advise that Tamils from the north of Sri Lanka are no longer presumptively eligible for refugee protection, but must be considered on their individual merits. Persons suspected of having links with the LTTE were, however, listed as having a potential risk profile.

[11] The Board noted that the Applicant was detained once in Sri Lanka in 1996 and accused of being a LTTE supporter. He was released by a court because there was no evidence for charging him. He had also traveled in and out of Sri Lanka with his own documents without any

problems. He was in Saudi Arabia from 2003 to 2006, Malaysia from June 2007 until mid 2009 and, while he was questioned by intelligence upon his return, he was never detained or arrested.

[12] Further, the Board noted that the country documents confirm that after the war many Tamils were questioned and investigated regarding potential links to the LTTE. In that regard, the Board accepted that his family home may have been checked in 2010. However, if, as he alleged, he was suspected of having information and names of escaped LTTE cadres, the Applicant would have been immediately arrested in April 2010 when the army intelligence or EPDP first questioned him and not told that he must give “reasonable answers” when they returned. He fled in June 2010 after the EPDP tried to extort money from him. The Board did not accept that the Applicant was told in 2010 that he was suspected of helping the LTTE and found that he was not a person of interest to the army or para militants as having ties to the LTTE.

[13] The Board noted that there were a number of significant credibility concerns with the Applicant’s allegations which were not adequately explained and which it described in detail in its reasons. As the Applicant has not challenged the Board’s credibility findings, these reasons are not detailed in this summary of its decision.

[14] Based on its credibility findings, the Board found that, other than the 1996 detention, the other alleged events had not occurred. The Board acknowledged that while the situation has improved for those previously identified as having ties to the LTTE, challenges still remained and that some sources allege that perceived connections have resulted in detention and torture.

However, because the Applicant did not have a real or perceived link to the LTTE, he would face minimal problems if returned (*Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 47).

[15] The Board found that the Applicant's ability to pass through checkpoints and security without difficulty or detention when traveling from the northern province to Colombo and in and out of the country was relevant to his potential risk profile. The Board found, on a balance of probabilities, that the Applicant had attempted to bolster his refugee claim by giving false testimony about his experiences in an effort to fit into the UNHCR risk profile of persons suspected of having ties to LTTE. There was insufficient credible and trustworthy evidence that after 1996 he came under army suspicion. Based on the change of country conditions and as a cumulative result of his undermined credibility, the Board found that there was no serious possibility of the Applicant facing persecution as a Tamil male from the north if he were to return to Sri Lanka.

[16] As to risk, the Board found that the Applicant faced only a generalized one. His evidence was that he left Sri Lanka in June 2010 because he did not want to pay the EPDP 3 million rupees. He believed the EPDP were looking for him because he worked abroad and they are known to target such people and to physically abuse, torture and murder those who do not pay. He stated that everyone in Sri Lanka fears this. The Board found that the Applicant fears extortion by the EPDP and the consequences of not adhering to their demands for money. The country evidence indicated that the EPDP has, since the war, moved to criminal activities and targets anyone who has money without regard for ethnicity. The Board found that the Applicant

was targeted for extortion for having worked abroad and not because he was Tamil. It referred to jurisprudence which found that individuals who are victimized more frequently because of perceived wealth or living in a more dangerous area, or facing retaliation for non-compliance with criminal demands, do not face a personalized risk removed from the subsection 97(1)(b)(ii) exception. The extortion that the Applicant faced was related to the perception of his wealth and his resulting fear did not amount to a nexus with a convention ground. The risk of extortion by paramilitary groups perceived to have money after returning abroad is prevalent and was therefore a generalized risk.

[17] As to the Applicant's status as a failed refugee claimant returnee, the Board noted documentary evidence that returning Tamils are subject to the same screening process for all persons returning to Sri Lanka regardless of whether they are returning on a voluntary basis or as a failed refugee claimant.

[18] The Board noted that the Applicant had safely returned to Sri Lanka after being abroad for long periods in the past. While there are contradictory reports on treatment of refugees at Colombo's Katunayake International Airport, it was clear that many Tamils are returning on a voluntary basis and as failed refugee claimants. In 2011 and 2012 the UK returned charter flights of failed asylum seekers and, of those monitored in July 2011, none were arrested or charged. In October 2011, the UNHCR assisted many Sri Lankans voluntarily returning from abroad, and its participation suggested a confidence that returnees would be safe. Non-voluntary returnees who were former LTTE combatants and participants in the Information Counselling and Reintegration Services Program experienced no significant challenges. Further, an August

2011 CBSA report stated that Sri Lanka's security situation continued to improve and that CBSA was committed to continuing to monitor the treatment of voluntary and escorted returnees.

[19] While returnees with suspected ties with the LTTE face increased surveillance, the Board was satisfied on a balance of probabilities that the Applicant, as a failed refugee claimant of Tamil ethnicity, could safely return to Sri Lanka and would not be sought after by the government or para-militants. There was no more than a mere possibility that he would face persecution as a returning asylum seeker.

[20] The Board then considered the Applicant's *sur place* claim. Having considered the evidence and submissions as to how he would be viewed and, therefore, treated by the Sri Lankan authorities based on how he came to Canada, it found that, on a balance of probabilities, he would not be perceived to be a member or supporter of the LTTE based on being a passenger on the *M.V. Sun Sea*.

[21] It noted that the Minister had disclosed a package of documents in reply to the Amnesty International (AI) documents dated June 12 and 16, 2012. The Minister expressed concern about some of the conclusions and statements made in the June 12, 2012 AI document. The Board stated that it had been pointed out to it by the Respondent that, with careful reading of the sources, there was a lack of supporting evidence for the conclusions drawn. And, for the reasons previously set out, the Board stated that when the Applicant left Sri Lanka he was not suspected of having links to the LTTE. In addition to the Applicant's lack of profile, and the statement by the Sri Lankan High Commission that it will not automatically presume passengers on the *M.V.*

Sun Sea have ties with the LTTE, there was insufficient credible evidence to conclude the Applicant faces more than a mere possibility of persecution.

[22] The Board found that the Applicant had not established membership in a particular social group in accordance with *Canada (Attorney General) v Ward*, [1993] 2 SCT 659, [1993] 2 SCR 689 because he arrived in Canada smuggled on a ship owned and operated by the LTTE. The Applicant may face temporary detention and/or questioning on suspicion of his travel or having ties to the LTTE or information about passengers. However, on a balance of probabilities, he was not a *sur place* refugee simply because he traveled on the *M.V. Sun Sea*. The Board considered whether the common experience of the passengers would lead the authorities to impute a political opinion to each passenger as an LTTE supporter, acknowledging that those suspected of being LTTE members or supporters may still be at risk of persecution as reported in the country documents. The Board accepted the Respondent's submissions that Sri Lankan authorities recognize the existence of economic migrants aboard the LTTE *M.V. Sun Sea* human smuggling operations. Further, that media reports, international terrorism experts, the Canadian government and the Sri Lankan government took the position that the *M.V. Sun Sea* was a LTTE smuggling operation. However, it found that the Applicant only learned of this after he arrived in Canada, and could not give a detailed account about his fears in relation to how he arrived in Canada. There was no persuasive evidence that he knew about any LTTE aboard the ship.

[23] While it will be known that he traveled on the *M.V. Sun Sea*, there was no evidence that all passengers will be arrested and persecuted as perceived LTTE supporters. Given his prior movements and activities, there was no serious possibility that the Applicant would be

persecuted on suspicion of LTTE ties due to this presence on the *M.V. Sun Sea*. The Board noted evidence where individuals smuggled by the LTTE and abandoned in Togo were safely returned to Sri Lanka.

[24] Finally, the Board considered compelling reasons. It noted that while compelling reasons was not raised as an issue, the Board had identified it at the hearing and the Respondent addressed it in submissions. The Board found that the Applicant's detention in 1996 would not rise to the level of compelling reasons pursuant to the subsection 108(1)(e)(4) IRPA exception. In any event, as subsection 108(1)(e) did not apply in these circumstances, the precondition for the potential application of subsection 104(4) was not met.

Issues

[25] In my view, the issues can be framed as follows:

1. Did the Board err in its *sur place* claim by making a contradictory finding and selectively analyzing the evidence?
2. Did the Board fail to consider cumulative persecution under section 96?
3. Did the Board err in its compelling reasons analysis?

Standard of Review

[26] A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008

SCC 9, [2008] 1 SCR 190 at para 57 [*Dunsmuir*]; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18).

[27] Prior jurisprudence has established that the factual analysis undertaken for a *sur place* claim (*M(P) v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77 at para 5 (*M(P)*); *Ganeshan v Canada (Citizenship and Immigration)*, 2013 FC 841 at para 9; *Dunsmuir*, above, at para 53). The standard of review for the Board's compelling reasons analysis is also reasonableness (*Lici v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1451 at para 12).

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, above, at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59 [*Khosa*]).

ISSUE 1: Did the Board err in its *sur place* claim by making a contradictory finding and selectively analyzing the evidence?

Applicant's Submissions

[29] The Applicant submits that the Board erred in the *sur place* aspect of his claim by selectively analyzing the evidence. While it is entitled to provide greater weight to some evidence, it must provide reasons for preferring that evidence to crucial, contradictory evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL)(CA) [*Cepeda-Gutierrez*]; *Francis v Canada (Minister of Citizenship and Immigration)*,

2011 FC 1095; *Alci v Canada (Minister of Citizenship and Immigration)*, 2005 FC 675; *Turner v Canada (Attorney General)*, 2012 FCA 159). This is an error of law (*Sinnathurai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 515; *Cepeda-Gutierrez*, above; *Garcia v Canada (Minister of Citizenship and Immigration)*, 2005 FC 807; *Toriz Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598; *Neto v Canada (Minister of Citizenship and Immigration)*, 2007 FC 664; *Villicana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205; *Bohorquez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 808).

[30] Recent jurisprudence does not support the Board's method of reviewing the evidence and has specifically discussed the weight to be given to independent evidence (*Kulasekaram v Canada (Minister of Citizenship and Immigration)*, 2013 FC 388; *Canada (Minister of Citizenship and Immigration) v B399*, 2013 FC 260; *Canada (Minister of Citizenship and Immigration) v B377*, 2013 FC 320).

[31] The Applicant submits that the Board failed to consider the evidence before it, including reports of Freedom from Torture and of AI that clearly contradict its finding that returning asylum seekers would not face persecution. The June 12, 2012 AI report entitled "Amnesty International with respect to forced returnees to Sri Lanka for passengers of the Ocean Lady and M.V. Sun Sea" (AI report) expressly identified a risk to all those on board the *M.V. Sun Sea* based on the Sri Lankan government's perception that they are LTTE supporters. AI is a credible and reliable source (*Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503 at paras 72-73; *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2009 FC 65 at para 64 [*Sittampalam*]). As the Board failed to consider the AI and the Freedom from

Torture reports, it committed a serious and reviewable error (*Sittampalam*, above). Further, the report to which the Board did refer, being the Response to Information Request, LKA103815.E “Sri Lanka: Information on the Treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having government authorization to leave the country, such as a passport” contained conflicting statements which were ignored by the Board. The Board also had evidence that confirmed that those suspected of LTTE support are at risk.

[32] The Board also erred in its *sur place* analysis by making contradictory findings which do not support its finding that the Applicant was not at risk and, therefore, rendering the decision unreasonable (*Amiragova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 64; *Sobheshedgh v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 570). Its finding that those suspected of having ties with the LTTE remain at risk and that the Applicant may be detained and questioned “on suspicion” of his travel or having ties to the LTTE cannot reasonably coincide with a finding that he is not at risk. There is a clear difference between being “screened” at the airport and questioning based on “suspicion”. The Applicant was suspected of LTTE connection upon arrival in Canada and similar suspicions on the part of the Sri Lankan authorities could occur upon his return to Sri Lanka, which would have remarkably different consequences (*B027 et al v Canada (Minister of Citizenship and Immigration)*, 2013 FC 485).

[33] The Board compared the Applicant’s previous safe returns to Sri Lanka to his return after travel on the *M.V. Sun Sea (Canada (Citizenship and Immigration) v B272*, 2013 FC 870). The

Board's failure to distinguish this factual situation from previous returns is unreasonable and contradictory.

[34] The Applicant submits that the Board cannot reasonably find that the Sri Lankan government's suspicions of him will be satisfied by asking a few questions as the documentary evidence indicates that they obtain information through torture. Further, his previous experience in 1996, which was accepted by the Board, establishes that there need not be evidence upon which to detain and torture a person suspected of supporting the LTTE.

[35] The Applicant submits that the Board's reasons must be "sufficiently clear, precise, and intelligible that a claimant may understand why his claim has failed" (*Sinnathamby v Canada (Minister of Citizenship and Immigration)*, 2005 FC 188; *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236, [1991] FCJ No 228 (CA) (QL); *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses*]).

Respondent's Submissions

[36] The Respondent submits that the Board's findings were clear and comprehensive. Reasons are not a stand-alone basis for quashing a decision, but must be read together with the outcome (*Newfoundland and Labrador Nurses*, above, at paras 12, 14, 18).

[37] The Respondent submits that the Board did not err in its assessment of the evidence, but, rather that the Applicant seeks to have the evidence reweighed. The Board is not required to

refer to every piece of contradictory evidence and to explain how they dealt with it (*Florea v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 598 (CA) (QL); *Hasan v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 946 (CA)(QL); *Kis et al v Canada (Minister of Citizenship and Immigration)*, 2012 FC 606 at para 11; *Kaur v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 190 at para 22 (TD)(QL)[*Kaur*]).

Further, administrative tribunals are to be accorded deference in weighing evidence and there may be a number of possible, reasonable conclusions (*Khosa*, above, at paras 61, 62, 67; *Dunsmuir*, above, at para 47).

[38] The Board acknowledged the contradictory evidence regarding the risk to returnees but was not convinced that the thresholds in sections 96 and 97 were met, which finding was open to it. The Applicant did not fit the profile of those at risk in Sri Lanka.

[39] The Respondent states that the Board acknowledged the AI report, but did not consider it to be determinative as there was a lack of supporting evidence for the conclusions drawn. Further, the High Commissioner for Sri Lanka publicly indicated that not all persons traveling on the ship have ties to the LTTE. Persons similarly situated have returned to Sri Lanka without automatically being accused of being LTTE supporters. And, significantly, the Applicant was unable to identify the risk of being on the ship without being prompted by his counsel. The fact that some documentary evidence could lead to a different conclusion is not sufficient to conclude that a material error was made (*Kaur*, above, at para 22).

[40] The Applicant's submission that the Board made contradictory findings ignores the strong credibility finding which was determinative. Accepting that the Applicant was detained in 1996 does not mean that his fear of persecution was well-founded given that his evidence was inconsistent, there were unexplained omissions in his PIF and he traveled to and from Sri Lanka without difficulty. Further, noting that LTTE supporters faced some risk was not contradictory because the Board found the Applicant did not fit the profile of being at risk. Further, the fact that he would be subject to a screening process does not create a risk of a well-founded fear of persecution.

Analysis

[41] In my view, the Board's assessment of the Applicant's *sur place* claim is unreasonable because of the manner in which it treated the AI report and because it made a contradictory finding concerning the Applicant's risk on return to Sri Lanka. These errors place the decision outside the range of reasonable and acceptable outcomes.

[42] A *sur place* refugee is defined in the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* (the UNHCR Handbook) as a person "who was not a refugee when he left his country, but who becomes a refugee at a later date". The UNHCR Handbook describes two situations in which a *sur place* claim may arise: (1) a change in circumstances in the country of origin during the person's absence, or (2) as a result of a person's own actions such as associating with refugees already recognized or expressing political views in the new country of residence.

[43] The concept of the *sur place* refugee has been applied to *M.V. Sun Sea* and *M.V. Ocean Lady* passengers as a result of public statements by officials stating that the Canadian and Sri Lankan government perceive passengers on those vessels to be associated with the LTTE. This Court, has, for various reasons, issued diverging decisions concerning whether those passengers are to be considered refugees *sur place*. However, given the nature of my findings below, it is not necessary, here, to delve into a review of those decisions.

[44] Here, the Applicant submits, in essence, that the Board erred in selectively reading the documentary evidence, by ignoring evidence which indicated that a returning asylum seeker would face persecution, and, that those on board the *M.V. Sun Sea* faced a risk that they would be perceived as LTTE supporters. Further, that the Board's analysis was contradictory.

[45] As to the issue of the evidence, Justice Snider set out some guiding principles in *Sarisky v Canada (Minister of Citizenship and Immigration)*, 2013 FC 186 at para 4:

[...]

- The Board is presumed to have considered the totality of the evidence, and is not required to refer to every piece of evidence in its decision (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 14-17, [1998] F.C.J. No. 1425 [*Cepeda-Gutierrez*]).
- It is a reviewable error for the Board to engage in selective analysis of documentary evidence, accepting evidence that supports its conclusions but ignoring contradictory evidence without explanation (see, for example, *Manoharan v Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 356 at para 6 (TD) (QL)). The relevance of the contradictory evidence to the facts in dispute must be taken into account; the more relevant the evidence, the more likely that failure to mention it will render the decision unreasonable (*Cepeda-Gutierrez*, above).

at paras 14-17). The Board may demonstrate that it considered a particular document by addressing the substantive point for which the contradictory evidence was put forward, rather than making explicit reference to the document itself.

[46] While acknowledging the principles outlined above, in the narrow circumstances of this case, it is my view that the Board erred in its treatment of the AI report. The relevant portions of the AI report states:

Sri Lankan government officials have made clear their belief that the passengers on the MV Sun Sea and the Ocean Lady were members or supporters of the Liberation Tigers of Tamil Eelam (LTTE) – a view echoed by some policy makers in Canada. While Amnesty International is not in a position to verify the past experience of each individual who arrived on these ships, conditions in Sri Lanka remain dangerous for persons suspected of LTTE affiliations. As Amnesty International has documented, individuals suspected of belonging to, or having links to, the LTTE face the risk of torture or other ill-treatment if arrested by the Sri Lankan authorities. *Further, and specifically with respect to the passengers on the above-mentioned vessels, Amnesty International believes that they would be exposed to a serious risk of detention, torture and mistreatment on return should the Sri Lankan authorities in turn suspect they had been on board those vessels...*

[emphasis added]

Conclusion

The Sri Lankan Ministry of Defence has deemed the passengers on the *M.V. Sun Sea* and *Ocean Lady* of having links to the LTTE suggesting the passengers included leaders, members and their families.

Amnesty International believes that individuals suspected of belonging to, or having links to, the LTTE face a real risk of torture or other ill-treatment if formerly returned to Sri Lanka.

Amnesty International is concerned that *M.V. Sun Sea* and *Ocean Lady* passengers, are perceived to be LTTE supporters or members and as such face well founded fear of persecution, including unlawful detention, torture and mistreatment should the Sri Lankan

authorities suspect they were passengers on the ships and they are formerly returned to Sri Lanka. LTTE suspects have been held incommunicado at detention centres run by the army, and by police intelligence agencies such as Terrorist Investigation Division and the Criminal Investigation Division.

[47] While the Board refers to the AI report, it does so only in relation to the Respondent's submission which expressed concern about some of its conclusions and statements. The Board stated it "It has been pointed out to the panel that with careful reading of the sources there was a lack of supporting evidence for the conclusions drawn". The post hearing submissions of the Minister address its concerns with the AI report. These are referenced by footnote, but are not commented on by the Board.

[48] Having made no finding as to the AI report, the Board restated its finding that when the Applicant left Sri Lanka he was not suspected of having LTTE ties. It went on to state that the High Commissioner for Sri Lanka publicly indicated that not all persons traveling on one of the ships to Canada have ties to the LTTE. The Board did not provide a reference for this statement. Based on the record, this information appears to have been taken from a star.com media article dated August 12, 2010 in which the High Commissioner for Sri Lanka is reported to have stated that a "considerable number" of the passengers on board the vessels were linked to the LTTE. The Board then, presumably, drew an inference from this that not all passengers would have such a link. The obvious question is then, which ones did and how will the Sri Lanka authorities determine this upon their return?

[49] The Board concluded that in addition to the Applicant's lack of profile of a person previously under suspicion and the fact that there are reports, which were not specified, that the

Sri Lankan government will not automatically presume that passengers have ties with the LTTE, there was insufficient credible evidence to conclude that the Applicant faced more than a mere possibility of persecution if he were to return to Sri Lanka.

[50] The Board is entitled to weigh the documentary evidence (*Barua v Canada (Minister of Citizenship and Immigration)*, 2012 FC 607 at para 22). However, as noted above, the Board errs when it engages in a selective analysis of documentary evidence, accepting evidence that supports its conclusions but ignoring relevant contradictory evidence without explanation (*Manoharan v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 356 at para 6 (TD)(QL)). The more relevant the evidence, the more likely that failure to mention it will render the decision unreasonable (*Cepeda-Gutierrez*, above, at paras 14-17).

[51] My concern in this case is that the Board did not explain why it gave greater weight to the attributed statement of the Sri Lankan High Commissioner, which is also not an independent source, than to the AI report. The AI report states that those on board the *M.V. Sun Sea* may be exposed to a serious risk of detention, torture and mistreatment on return should the Sri Lankan authorities in turn suspect they had been on board those vessels. While the Board reasonably found that the Applicant had no prior links to the LTTE, it is not the Applicant's past that would lead to such suspicion, but his travel on the *M.V. Sun Sea*. This is the very nature of the *sur place* claim, being that while a person was not a refugee when he left his country he may become one as a result of his own actions, such as association with others, after he has left his country of origin and this is what the AI report speaks to. Further, although the Board also states that there are reports that the Sri Lankan government will not automatically presume passengers have ties

with the LTTE, these are not identified in the decision nor is the reference made to the Freedom from Torture briefing report dated September 13, 2012 entitled “Sri Lankan Tamils tortured on return from the UK”.

[52] If the Board rejected the AI report based on the Respondent’s concerns then, in my view, this would require further explanation given the context of the report, its source and its importance to the *sur place* issue. As Justice Mandamin stated in *Sittampalam*, above:

[64] Reports by Amnesty International, Human Rights Watch and the UNHCR are regularly used by tribunals and reviewing courts and are regarded as credibly reporting on human rights conditions in many different countries. Justice Tremblay-Lamer stated in her decision in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503 (CanLII), 2006 FC 1503:

[72] The delegate's blanket rejection of information from agencies with worldwide reputations for credibility such as AI and HRW is puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources. Indeed, the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility (France Houle, "Le fonctionnement du régime de preuve libre dans un système non-expert: le traitement symptomatique des preuves par la Section de la protection des réfugiés" (2004), 38 *R.J.T.* 263, at pages 315-316 and at note 136).

[73] This reputation for credibility has been affirmed by Canadian courts at all levels. The Supreme Court of Canada relied on information compiled by AI, as well as one of its reports, in *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 S.C.R. 779, at pages 829, 830, 839. That Court also cited AI in *Suresh*,

above, at paragraph 11 in noting the use of torture in the context of that case.

[...]

[81] I adopt the position of Justice Marshall Rothstein who stated in *Rosales v. Canada (Minister of Employment and Immigration) reflex*, (1993), 72 F.T.R. 1 (F.C.T.D.), at paragraph 7 that a reviewable error is committed when a decision maker "arrives at its conclusion by ignoring relevant and apparently overwhelming evidence to the contrary." (underlining added)

[53] Justice Mandamin also referred to the Supreme Court's caution in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 as to reliance on assurances by a state that it will refrain from torture when it has engaged, or permitted that practice to be engaged, in the past. While Justice Mandamin stated that he did not propose to extend the same standard to government pronouncements, a note of caution was appropriate in receiving such government statements where there is credible, independent evidence to the contrary. Considering this and the above, in these circumstances the Board should have addressed the AI report by giving its reasons for not accepting its content.

[54] As to the inconsistent finding, the Board acknowledges that persons suspected of having links to the LTTE have a potential risk profile. Further, that those suspected of being LTTE members or supporters may still be at risk of persecution as reported in the country documents. The Board also acknowledges that "for persons suspected of having links with the LTTE conditions remain challenging with allegations from a number of sources that LTTE members and those perceived to have connections continue to be questioned and some detained will be tortured". The Board does not question that the Sri Lankan authorities will identify the

Applicant as a passenger on the *M.V. Sun Sea* should he return and, in fact, states that he will tell them that he was. It also finds that upon arrival, the Applicant may face temporary detention and/or questioning by the Sri Lankan authorities “on suspicion of his travel or having ties to the LTTE or information about the passengers or LTTE on the ship”. It is difficult to find that this is not contradictory.

[55] If the Board accepts that the Sri Lankan authorities may detain the Applicant because of their suspicions arising out of his travel on the *M.V. Sun Sea* or having ties to the LTTE or information about the passengers on the *M.V. Sun Sea*, and, if it accepts that persons suspected of LTTE links are at risk of persecution, then this would seem to contradict its finding that there is no serious possibility that the Applicant will face persecution. In support of this finding the Board relies, in part, on the fact that the Applicant travelled in and out of Sri Lanka in the past, and, was unaware of the LTTE’s involvement with smuggling operations until after the voyage. In my view, the Applicant’s prior travel in and out of the country has limited bearing on the *sur place* analysis in these circumstances. And, while he may not have been aware of the LTTE while he was on board the vessel, this does not mean that the authorities will take him at his word on this point upon his return.

[56] Finally, I would note *YS v Canada (Minister of Citizenship and Immigration)*, 2014 FC 324 [YS]). There, the Board found that the applicant therein would be detained and questioned on return but that there was insufficient evidence to find that the applicant would be presumed to have or have had ties to the LTTE by the Sri Lankan government simply because he was a passenger on the *M.V. Sun Sea*. Justice Russell found that the fact that the applicant therein had

been cleared of any suspicion of LTTE connection in the past does not deal with the *sur place* claim, although it has some relevance to it. He found that the Board was obliged to consider a forward looking *sur place* claim based on a perceived LTTE connection as a result of the applicant's arrival in Canada on the *M.V. Sun Sea*. He stated the following:

[69] There was significant evidence in this case that Sri Lankan authorities are fully cognizant of the connections between the *MV Sun Sea* and LTTE membership. This doesn't mean they believe all *MV Sun Sea* passengers have LTTE links, but all returnees are suspects and are questioned on arrival and failed refugee claimants are questioned more closely. It is inevitable that the authorities will ask the Applicant how he got to Canada, and this will immediately identify his association with the *MV Sun Sea*. This means that he will be detained for some amount of time to ascertain whether, for instance:

- a. he is an LTTE member;
- b. he has organized for the LTTE abroad; and
- c. he possesses LTTE intelligence.

Hence, upon his return, the Applicant will be detained and interrogated about possible LTTE connections. Amnesty International says that individuals in the position of the Applicant face a real risk of torture or other ill-treatment if returned to Sri Lanka. The RPD's finding that there is "insufficient evidence to show that the Sri Lankan authorities will have the knowledge that the claimant was a passenger on the Sun Sea" and that "there was insufficient evidence that the Sri Lankan government would treat the claimant any different than any other returnee to the country . . ." in my view simply ignores the evidence and the reality of what the Applicant faces.

[70] ...Although the RPD concludes that Tamils, as well as others, "may be victims of abuse of power from Sri Lankan police or CID," the RPD shies away from a consideration of what will happen to the Applicant when he is interrogated in the face of evidence that Sri Lankan authorities are very interested in links between the *MV Sun Sea* passengers and the LTTE, and evidence from Amnesty International that individuals who are "suspecting of belonging to, or having links to the LTTE face a real risk of torture or other ill-treatment if forcibly returned to Sri Lanka." These risks exist not just for those who do have links, but for those suspected of having links. The RPD appears to assume that the Applicant might not even be identified as a passenger on the *MV*

Sun Sea (which he will) and that, even if he is, he won't be treated "any different than any other returnee . . . given his complete lack of past association with the LTTE." In my view, the evidence does not support these findings. The Decision is unreasonable on this ground alone and requires reconsideration.

[57] The *YS* decision, amongst other things, highlights potential significance of the AI report.

[58] As stated above, in my view, the Board's failure to explain why it discounted that report and its inconsistent finding as to potential risk, the decision is unreasonable. Accordingly, it is unnecessary to consider the final two issues.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the matter is to be remitted to a different panel of the Immigration and Refugee Board for reconsideration; and
2. No question of general importance is certified.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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